

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGARET MILLER-HOTCHKISS,

Plaintiff,

v.

SAFEWAY, INC.,

Defendant.

CASE NO. 23-cv-908

ORDER DENYING MOTION TO
AMEND ANSWER AND FRCP 26(A)(2)
EXPERT DISCLOSURE STATEMENT

This matter comes before the Court on Defendant Safeway, Inc.'s motion for leave to amend its Answer to include additional affirmative defenses and to amend its FRCP 26(a)(2) Expert Disclosure Statement to add a human factors expert. Dkt. No. 26. Because the deadline for amended pleadings and FRCP 26(a)(2) expert disclosures passed on July 15, 2024, *see* Dkt. No. 9, Safeway sought Plaintiff Margaret Miller-Hotchkiss's consent for these late amendments. *See* Dkt. No. 26 at 6. Miller-Hotchkiss refused consent, *see id.*, and opposes this motion. *See* Dkt. No. 29. Having reviewed the parties' briefing, the record, and the law, the Court DENIES the motion for the reasons explained below. Dkt. No. 26.

1 First, the Court addresses Safeway’s request to amend its Answer. “Under
2 Federal Rule of Civil Procedure 16(b), a party seeking to amend a pleading after the
3 scheduling order’s deadline for doing so must show ‘good cause’ for amendment.”
4 *Seattle Pac. Indus., Inc. v. S3 Holding LLC*, 831 F. App’x 814, 816 (9th Cir. 2020)
5 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992)). “A
6 plaintiff who fails to ‘demonstrate diligence in complying with the dates set by the
7 district court ... has not demonstrated good cause.’” *Id.* (quoting *Zivkovic v. S. Cal.*
8 *Edison Co.*, 302 F.3d 1080, 1087–88 (9th Cir. 2002)). While a court’s good-cause
9 inquiry may consider prejudice and other factors, “if [the moving party] was not
10 diligent, the inquiry should end.” *Johnson*, 975 F.2d at 609.

11 Here, Safeway seeks—nearly eight months after the deadline for amended
12 pleadings—to amend its Answer to add several affirmative defenses, all of which it
13 characterizes as “standard common law defenses to any premises liability cause of
14 action.” Dkt. No. 26 at 4. Safeway argues that these added defenses will not
15 surprise or prejudice Miller-Hotchkiss because they are “the’ standard defenses to a
16 slip-and-fall claim[.]” *Id.* But this argument weighs *against* the motion. Safeway
17 offers no explanation as to why it did not offer these routine, foreseeable defenses
18 earlier. When assessing good cause under Rule 16(b), courts consider “whether the
19 moving party knew or should have known the facts and theories raised by the
20 amendment in the original pleading.” *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388
21 (9th Cir. 1990). Because Safeway should have known to assert these defenses, the
22 Court, finding a lack of diligence, DENIES the request for leave to amend. *See Acri*
23 *v. Int’l Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986)

1 (“[L]ate amendments to assert new theories are not reviewed favorably when the
2 facts and the theory have been known to the party seeking amendment since the
3 inception of the cause of action.”); *Seattle Pac. Indus., Inc.*, 831 F. App’x at 816–17.

4 Next, the Court turns to Safeway’s request to amend its expert disclosure
5 statement. “If a party fails to provide information or identify a witness as required
6 by Rule 26(a) or (e), the party is not allowed to use that information or witness to
7 supply evidence on a motion, at a hearing, or at a trial, unless the failure was
8 substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). “[A] district court
9 may properly impose an exclusion sanction where a noncompliant party has failed
10 to show that the discovery violation was either substantially justified or harmless.”
11 *Merchant v. Corizon Health, Inc.*, 993 F.3d 733, 740 (9th Cir. 2021). “In considering
12 whether a violation of a discovery deadline is justified or harmless, courts consider
13 (1) prejudice or surprise to the party against whom the evidence is offered; (2) the
14 ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial;
15 and (4) bad faith or willfulness involved in not timely disclosing the evidence.” *W.*
16 *Towboat Co. v. Vigor Marine, LLC*, No. C20-0416-RSM, 2021 WL 2156694, at *1
17 (W.D. Wash. May 27, 2021) (citing *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App’x
18 705, 713 (9th Cir. 2010)). The burden falls on the party facing exclusion to
19 demonstrate that these factors support relief from the deadline. *Id.*

20 Here, the factors weigh against relief. As to the first factor, Safeway argues
21 that adding their expert would cause no prejudice to Miller-Hotchkiss because
22 Miller-Hotchkiss has her own human factors expert. Dkt. No. 26 at 5. The Court is
23 not persuaded. With discovery closed and trial fast approaching, allowing Safeway

1 to add a new expert at this late date—which, in turn, would warrant giving Miller-
2 Hotchkiss additional time to depose and rebut that expert—would unreasonably
3 disrupt the schedule set by the Court, especially given the multiple extensions that
4 the Court has already granted. *See Wong v. Regents of the Univ. of Cal.*, 410 F.3d
5 1052, 1062 (9th Cir. 2005).

6 As to the second factor, Safeway argues that Miller-Hotchkiss can cure any
7 prejudice by taking its expert’s deposition. Dkt. No. 26 at 5. Again, the Court is not
8 persuaded. A central “goal of [Rule] 26(a)(2) is to allow parties to prepare for expert
9 depositions and to shorten or decrease the need for expert depositions.” *Koho v.*
10 *Forest Labs., Inc.*, C05-667RSL, 2015 WL 11201281, at *6 (W.D. Wash. Mar. 31,
11 2015). The unforeseen burden of having to take additional deposition testimony is
12 simply not warranted at this late stage in the case.

13 As to the third factor, the Court finds Safeway’s request incompatible with
14 the existing case schedule, especially given that the deadline for *Daubert* motions
15 has passed.

16 As to the fourth factor, the Court makes no finding of bad faith or willfulness.

17 On balance, the factors support a conclusion that allowing Safeway to amend
18 its FRCP 26(a)(2) Expert Disclosure Statement in the manner requested is neither
19 harmless nor substantially justified. The request is therefore DENIED.

20 Dated this 21st day of April, 2025.

21 

22 Jamal N. Whitehead
23 United States District Judge